

IN THE MATTER OF ARBITRATION BETWEEN

Fraternal Order of Police,
Lodge #5

Union

AND

City of Philadelphia

Employer

* AAA Case No
* 01-17-0007-5742
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* Det. James A. Weiss
* Termination
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For the Union: Ralph J. Teti, Esq.

For the Employer: Benjamin Patchen, Assistant City
Solicitor

OPINION AND AWARD

Date of Hearing: August 15, 2018

Date of Award: October 8, 2018

Arbitrator: Samantha E. Tower, Esq.

BACKGROUND

The City of Philadelphia (City) terminated Detective James A. Weiss (Grievant) for Conduct Unbecoming on November 6, 2017. Grievant also received lesser discipline for Conduct Unbecoming and Disobedience. On October 10, 2017, prior to Grievant's termination, he was suspended for thirty days with intent to dismiss and the Fraternal Order of Police, Lodge #5 (Union) filed a grievance challenging Grievant's termination. (C1¹) An arbitration hearing was held on August 15, 2018, and the parties closed orally on the record.

The parties stipulated that the Collective Bargaining Agreement was collectively bargained between the parties and that the Disciplinary Code, including the penalties, are part of the CBA. The following provisions of the Disciplinary Code and levels of discipline are relevant:

- CONDUCT UNBECOMING, SECTION 1-\$001-10 Unspecified.
First Offense: Reprimand to Dismissal.
- CONDUCT UNBECOMING, SECTION 1-\$007-10 Knowingly lying under oath to any material facts in any proceeding.
First Offense: Dismissal.

¹ C1 is the termination package which contains the grievance and disciplinary documents.

- CONDUCT UNBECOMING, SECTION 1-\$009-10 Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation. 10 days to Dismissal.
- DISOBEDIENCE, SECTION 6-\$009-10 Improper or unauthorized use of departmentally owned or leased equipment. Reprimand to 5 days.
- DISOBEDIENCE, SECTION 6-\$010-10 Communicating or imparting local, state, or federal law enforcement information without authority or to unauthorized persons. Reprimand to Dismissal.

(J1).

Grievant worked for the City of Philadelphia in the Police Department for approximately 18 ½ years and was employed as a Detective at the time of his dismissal. He had no prior discipline in his record. Internal Affairs began an investigation into Grievant after it received a notification from the 24th Police District in reference to a domestic incident. Lieutenant Louis Higginson (Lt. Higginson) testified that when Internal Affairs receives a notification related to a domestic matter, they determine, based on the facts, whether to proceed with further investigation. Lt. Higginson explained that his investigation into Grievant began when Grievant's ex-girlfriend, Ms. M [REDACTED], reported that she observed Grievant looking in her front window on June 25, 2017. Lt. Higginson said that he determined that he needed to

conduct a serious investigation into allegations of stalking.

Ltn. Higginson outlined the steps he took when he conducted the investigation: he interviewed Ms. M; he interviewed Grievant; he interviewed approximately five to ten civilian witnesses; he interviewed over ten police officers and police supervisors; he requested information about whether Grievant ran queries on one of the witnesses from the Philadelphia Crime Information Center (PCIC); and he obtained the transcript from the PFA hearing.

Based on the information he gathered during his investigation, Ltn. Higginson determined that Grievant violated six sections of the Disciplinary Code.² On August 8, 2017, he sent the following specifications to the Police Commissioner, and they were subsequently sent to the Police Board of Inquiry (PBI)³:

ARTICLE I: Conduct Unbecoming

SECTION 1-\$001-10: Unspecified

² Grievant was ultimately disciplined for only five of the six original charges.

³ Only the five charges for which Grievant was ultimately disciplined are included here.

SPECIFICATION: Internal Affairs Investigation #16-1072 determined that you stalked K [REDACTED] M [REDACTED]. Ms. M [REDACTED] stated she cut off all contact with you in early February 2016 and you corroborated this. A physical download of Ms. M [REDACTED]'s cell phone confirmed this also. Ms. M [REDACTED] stated that she did not invite you to her home on February 9, 2016 when you were found in her back yard. You admitted to being on her deck that evening and the incident was also documented by police when they arrived. You stated that you told Ms. M [REDACTED] that evening that you would not bother her again. A statement from Ms. M [REDACTED] and a text message recovered from her cell phone reads, "My neighbor knocked on my door to tell me he saw Jim trying to look in my door and then like...hiding behind my neighbor's truck," place you on the 3400 block of Miller Street in late May 2016. Ms. M [REDACTED] stated she did not invite you to her home on June 25, 2016 when she saw you looking in her front window. You admitted going to Ms. M [REDACTED]'s home that morning and video footage captured the incident as well. Ms. M [REDACTED] stated she observed you parked in the "Toys R Us" parking lot, facing Ms. M [REDACTED]'s home, on several occasions. You admitted to sitting in the "Toys R Us" parking lot on one occasion. Ms. M [REDACTED] described the incidents involving you as making her feel threatened, unsafe, uncomfortable, scared and irritated.

ARTICLE I: Conduct Unbecoming

SECTION 1-§007-10: Knowingly lying under oath to any material facts in any proceeding

SPECIFICATION: Internal Affairs Investigation #16-1072 determined that you lied, under oath, during a Protection From Abuse (PFA) hearing about being at K [REDACTED] M [REDACTED]'s house on June 25, 2016. During a re-interview at Internal Affairs on April 6, 2017, you admitted that the

statement you gave during the PFA hearing was false.

ARTICLE I: Conduct Unbecoming

SECTION 1-\$009-10: Lying or attempting to deceive regarding a material fact during the course of any Department investigation

SPECIFICATION: Internal Affairs investigation #16-1072 determined that you lied during your Internal Affairs interview on February 17, 2017.

ARTICLE VI: Disobedience

SECTION 6-\$009-10: Improper or unauthorized use of Departmentally owned or leased equipment

SPECIFICATION: Internal Affairs investigation #16-1072 determined that you misused the Philadelphia Police Department computer systems. You admitted to using your access to the BVM system to query the registration plate of Mr. S [REDACTED] shortly after you observed K [REDACTED] M [REDACTED] riding in Mr. S [REDACTED]'s vehicle on January 30, 2016. On July 1, 2018, a request was sent to PCIC to search for anyone that queried the registration plate, [REDACTED], between January 1, 2016 and April 1, 2016. The results were received and confirmed that you queried the registration plate, [REDACTED], from a computer terminal inside East Detectives on February 2, 2016. On May 22, 2017, a request was sent to PCIC to search for anyone that queried R [REDACTED] S [REDACTED], DOB [REDACTED], between January 1, 2016 and April 1, 2016. The results indicated that you queried R [REDACTED] S [REDACTED], DOB [REDACTED], from a computer terminal inside East Detectives on February 2, 2016.

ARTICLE VI: Disobedience

SECTION 6-§010-10: Communicating or imparting local, state, or federal law enforcement information without authority or to unauthorized persons

SPECIFICATION: Internal Affairs investigation #16-1072 determined that you mishandled evidence. You sent this evidence to an unauthorized person. While searching for evidence in the physical extraction of K [REDACTED] M [REDACTED]'s cell phone, five (5) photographs sent by you to K [REDACTED] M [REDACTED] on October 13, 2016 were located. Four (4) of the photographs were of a deceased male lying next to some train tracks and the fifth photograph were [sic] of the train tracks themselves.

(C1).

A PBI hearing was held on September 21, 2017. The PBI determined that Grievant violated five of the six provisions of the Disciplinary Code for which he was charged and recommended the following discipline:

- CONDUCT UNBECOMING, SECTION 1-§001-10 Unspecified. (Dismissal)
- CONDUCT UNBECOMING, SECTION 1-§007-10 Knowingly lying under oath to any material facts in any proceeding. (Dismissal)
- CONDUCT UNBECOMING, SECTION 1-§009-10 Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation. (20 Days)
- DISOBEDIENCE, SECTION 6-§009-10 Improper or unauthorized use of departmentally owned or leased equipment. (10 Days)

- DISOBEDIENCE, SECTION 6-\$010-10 Communicating or imparting local, state, or federal law enforcement information without authority or to unauthorized persons. (Reprimand)

(C1).

Grievant testified about his nearly nineteen years employment with the Police Department. He also reviewed his relationship with Ms. M [REDACTED] which spanned approximately eight years before they halted all contact in February 2016. Grievant explained that even after he agreed to her request to stop talking, he still cared for Ms. M [REDACTED] and worried about her drug addiction which she had revealed to him in July 2014. Grievant had tried to help Ms. M [REDACTED] with her drug rehabilitation and worried that she was hanging out with people who would not be beneficial to her sobriety. Even though they were no longer romantically involved, Grievant did not want Ms. M [REDACTED] to become one of the opioid fatalities that he saw routinely while on the job.

Grievant acknowledged that he went to Ms. M [REDACTED]'s house on June 25, 2016 and said that he did not knock because he heard her voice and he realized it was very late and he got nervous. Grievant admitted that he

lied under oath at the PFA hearing when he told the judge that he was not at Ms. M [REDACTED]'s house on June 25, 2016. Grievant expressed regret for lying under oath and explained that he was afraid that he would be fired if the judge granted a permanent PFA.

Grievant also admitted that he went to Ms. M [REDACTED]'s house in February 2015. He acknowledged that he was in her backyard but denied looking in her window. The police arrived and talked to Grievant and Ms. M [REDACTED] but no charges were filed.

Grievant admitted that he used a police computer to run a license plate. He said that he was concerned that Ms. M [REDACTED] was hiding things from him or lying to him so he ran the license plate and then used the information he gained from the search to Google her acquaintance's name. He then told Ms. M [REDACTED] the information he discovered about her acquaintance. Grievant said that he made Ms. M [REDACTED]'s sobriety his issue and, in February 2016, finally realized that he was being manipulated.

Grievant testified that he would be able to perform his job duties if he were reinstated. He also said

that he never let his personal life affect his job performance.

On cross-examination, Grievant agreed that officers are held to a higher standard even when they are off duty. When he was asked about a series of approximately 60 text messages he sent on one day to Ms. M [REDACTED], Grievant acknowledged that he sent them but raised the possibility that there were more text messages not included in the sampling before him. He admitted that he texts a lot when he is angry. He acknowledged that one of Ms. M [REDACTED]'s text responses was "I don't like this. It makes me uncomfortable. I know you don't like it either." (C2, CITY 382). When asked if Ms. M [REDACTED] only responded three times, Grievant pointed out that Ms. M [REDACTED] could have deleted other text messages and saved only the text messages presented at the hearing. Grievant said that he recalled that there were fifteen responses from Ms. M [REDACTED] included in the text messages presented at the PBI hearing and explained that she could have unlocked certain texts and deleted them. He said that he did not think that the snapshot of the text messages reviewed at the arbitration hearing was an

accurate portrayal of a situation that lasted for almost two years in their relationship.

When asked about the pictures found on Ms. M [REDACTED]'s cell phone, Grievant denied intentionally sending pictures of dead bodies. He explained that he intended to send her the picture of the train tracks in reference to the movie "Stand By Me" and he believed the other pictures were inadvertently included in the text.

Grievant said that he understood that he had an obligation to testify truthfully at the PFA hearing. He acknowledged that he did not give a truthful answer. Grievant testified that he had never lied on the job. Grievant seemed unsure about whether these incidents could affect his job. He said "Can this possibly affect my job? Yes. Do I know that for a fact? I don't." (TR. Pg. 106, Ln. 6-8).

Commissioner Richard Ross testified that he expects police officers to carry themselves with professionalism at all times and in a manner that represents the department in the highest regard. Commissioner Ross said that he agreed with the PBI panel that recommended terminating Grievant.

He explained that credibility is of the utmost importance, and it is becoming very difficult to use police officers who have been found guilty of lying.

Commissioner Ross testified that the Disciplinary Code does not grant discretion if an officer is found to have lied under oath. The penalty for a first offense is dismissal. He stated that there is a direct nexus between sworn testimony from a police officer and his job, even if the officer is not on-duty. If an officer raises his hand and swears to the testimony then the expectation is that he will tell the truth whether it is a criminal matter or a personal matter. Commissioner Ross said it would be a big problem if Grievant were reinstated because he [Commissioner Ross] "...would never be able to use him." (TR. Pg. 62, Ln. 19).

On cross-examination, Commissioner Ross was asked about a list created by the District Attorney that contained 30-50 police officers who will not be called to testify because they allegedly lied in some way. Commissioner Ross answered that there are some inherent issues with the list and the department agrees with the

Union that it is questionable why certain people are on the list. The list was not introduced at the hearing.

EMPLOYER POSITION

The City contends that there was just cause for termination for two reasons: (1) an investigation concluded that Grievant stalked his ex-girlfriend; and (2) Grievant lied under oath at a Protection From Abuse (PFA) hearing. The City points out that under the Disciplinary Code, dismissal at the first offense is the only penalty for "lying under oath." It contends that the Arbitrator does not have the authority to change the penalty to anything other than the parties' agreed upon penalty. Moreover, it argues that even if the Arbitrator did have the authority to change the penalty, termination for lying under oath is the appropriate penalty here.

The City asserts that the evidence supports a finding that Grievant stalked his ex-girlfriend. It stresses that Grievant admitted that he showed up, uninvited, to Ms. M [REDACTED]'s house on at least three occasions, and Grievant admitted sending approximately 60 text messages on one of the days in question. The texts

introduced at the hearing show that Ms. M [REDACTED] felt uncomfortable when she received Grievant's texts. The City acknowledges that Ms. M [REDACTED] did not testify at the arbitration hearing but insists that the evidence in the record is enough for a finding that Grievant stalked Ms. M [REDACTED]. According to the City, there is no rebuttal evidence and it has proven its case for stalking, and the appropriate penalty for stalking is dismissal.

The City argues that it properly dismissed Grievant for lying under oath. The Disciplinary Code is part of the CBA, and the parties agreed that the only penalty for the offense of knowingly lying under oath in any proceeding about a material fact is dismissal. It insists that there is no discretion, and therefore no mitigating circumstances should be considered. Grievant admitted that he lied at the PFA hearing and, therefore, the City asserts that dismissal was appropriate.

The City contends that Grievant's off-duty testimony has a nexus to his job because Commissioner Ross would not feel comfortable using Grievant as a Detective after he was found to have he lied in a proceeding. The City questions Grievant's credibility and points out that

Grievant acknowledged that lying in a previous criminal proceeding could have an impact on his job.

Additionally, Grievant was charged and disciplined for several minor offenses of the Disciplinary Code. The City points out that Grievant admitted that he accessed the police database improperly to access the license plate information of an individual connected to Ms. M [REDACTED] which was a violation of the Disciplinary Code and for which Grievant was disciplined. Grievant also violated the Disciplinary Code when he lied to Internal Affairs during its investigation into his alleged stalking of Ms. M [REDACTED].

The City offered three comparators at the hearing wherein officers were dismissed for lying under oath. It stresses that there is nothing in the evidence that suggests the Police Department has not applied the Disciplinary Code consistently.

The City requests that the grievance be denied because there was just cause for discipline, and dismissal was the appropriate penalty.

UNION POSITION

The Union argues that the appropriate penalty here is not termination. Grievant's personnel record was unblemished and his performance reports were positive until the problem that resulted in his termination. It stresses that Grievant's termination came from a personal relationship and not from anything related to his duties as a police officer.

The Union explained that Grievant's over eight-year relationship with Ms. M [REDACTED] turned stormy and that is what led to Grievant's termination. The relationship became stormy, in part, because Ms. M [REDACTED] had a drug addiction, and Grievant was trying to encourage her to get help for her problem.

The Union asserts that there is no evidence of stalking. Ms. M [REDACTED] would ask Grievant for help and he would help her. Grievant admits to going to her house on a few occasions, but Ms. M [REDACTED] never wanted Grievant to be arrested or for anything to affect his job as a police officer. The Union acknowledges that she requested a PFA but points out that the judge never issued

a permanent PFA and the temporary one expired. The Union insists that Grievant's involvement with Ms. M [REDACTED] never affected his duties as a police officer.

The Union contends that there is no dispute about the basic facts and that there is no evidence of stalking. According to the Union, there is evidence that Grievant continued to involve himself in the life of Ms. M [REDACTED], even after the romance was gone. The small snapshot of Grievant's relationship with Ms. M [REDACTED] which included incidents in February and June as well as an exchange of text messages, is not the full picture of the relationship. The Union urges the Arbitrator to take into consideration Grievant's explanation of his on-again, off-again relationship and to determine that the appropriate remedy here is to reinstate Grievant.

The Union acknowledges the Commissioner's concerns about not wanting Grievant back because he lied under oath but asserts that this should not be considered here because any claimed compromise to the Commissioner's ability to use him because of that has not occurred yet. The right thing to do is to put Grievant back to work.

The Union argues that the City bundled the charges together, and if the Arbitrator does not sustain all the charges then she has the discretion to reinstate Grievant. Not only is there no evidence of stalking, but also there is no mention of stalking in the Disciplinary Code.

The Union disagrees with the City's comparators because they all involve a lie or misrepresentation in connection with the officers' official duties. Here, Grievant was the defendant in a PFA Order which was a proceeding that did not involve the department and was not part of his duties as a police officer. When Grievant testified at the PFA hearing that he was not at Ms. [REDACTED]'s house on June 25, he was scared. The Union insists that lying under oath at the PFA hearing should not be the sole thing that disqualifies him from returning to duty now.

The Union stresses that there are other police officers who have so-called "do not testify" issues with the District Attorney. There are people currently working in the Police Department who are open to the allegation that they were not always truthful. Therefore, according

to the Union, the fact that someone was untruthful, whether or not they were charged with a specific violation, should not be a disqualifying or terminable offense.

The Union requests that the Arbitrator sustain the grievance and reinstate Grievant.

FINDINGS

The issue is whether the City had just cause to dismiss Grievant, and if not, what shall be the remedy?

Grievant acknowledges that he committed the conduct for which he was charged under 1-\$009-10, 6-\$009-10, and 6-\$010-10. There is no dispute that he improperly used police equipment; nor is there a dispute that he lied during the Internal Affairs investigation and that he mishandled evidence by sending photographs to an unauthorized person. Although Grievant claims his misconduct related to the handling of the photographs was not intentional, I am unpersuaded that this claim serves as a sufficient basis to diminish responsibility for the established misconduct. On this record, I find that Grievant committed the misconduct with which he was charged

under 1-\$009-10, 6-\$009-10, and 6-\$010-10 and properly was disciplined for this misconduct in accordance with the penalties set forth in these sections of the Disciplinary Code. The established penalties for the charges against Grievant under 1-\$009-10, 6-\$009-10, and 6-\$010-10 include discipline short of dismissal - 20 days, 10 days, and Reprimand, respectively.

Grievant also was charged with two other violations of the Disciplinary Code, each of which was found to warrant his dismissal. Grievant was charged with stalking Ms. M [REDACTED] in violation of 1-\$001-10, "CONDUCT UNBECOMING", which specifies that the penalty for a first offense is "Reprimand to Dismissal". Grievant acknowledges that he went to Ms. M [REDACTED] house without an invitation on three occasions. Grievant said that he went to her house on all of those occasions because he was worried about her sobriety. Grievant acknowledges that he sent Ms. M [REDACTED] approximately sixty texts on one day, although he questions whether the texts submitted at the arbitration hearing include all of the texts exchanged on that day. The Union insists that there is no evidence of stalking and that Grievant was simply concerned for Ms. M [REDACTED] despite the end of their romantic relationship.

The City insists that Grievant is guilty of stalking Ms. M [REDACTED] based on the evidence in the record.

Although there is no mention of stalking in 1-§001-10 of the Disciplinary Code, this section expressly applies to "CONDUCT UNBECOMING" that is "Unspecified." A significant deficiency in the City's evidence related to this charge is that no definition of stalking was provided at the hearing. The only testimony presented at the hearing in relation to the stalking charge was Lt. Higginson's description of the investigation and Grievant's testimony about his relationship with Ms. M [REDACTED].

There is no evidence in the record that establishes that the texts introduced were a complete reflection of the exchange between Grievant and Ms. M [REDACTED] on the day in issue. Nor does the record establish -- or even suggest -- how many texts one must send for a finding of stalking under 1-§001-10. The same is so regarding any standard which properly may be used to determine how many times someone must go to another person's house uninvited for a finding of stalking under 1-§001-10. Stalking is a very serious charge, and I find

that the totality of the evidence submitted to support the charge of stalking under 1-\$001-10 is inconclusive.

I do not agree with the Union's claim, however, that if the record fails to establish that Grievant committed all five violations of the Disciplinary Code with which he was charged, I should exercise my discretion to modify the discipline imposed for the violations which have been established. In addition to the stalking charge, Grievant was charged under 1-\$007-10 "CONDUCT UNBECOMING", for lying under oath in a legal proceeding. As specified in this section, the discipline negotiated by the parties for this first offense is "Dismissal". The undisputed evidence shows -- and Grievant acknowledges -- that he lied when under oath at a PFA hearing about being at K [REDACTED] M [REDACTED]'s house on June 25, 2016.

There is no claim that Grievant's lie did not pertain to a material fact in issue at that hearing, but, in support of its argument that the penalty of dismissal should be reduced, the Union points out that Grievant did not lie under oath while on-duty. However, the Disciplinary Code does not distinguish between on-duty and off-duty conduct. Rather, 1-\$007-10 expressly states:

"Knowingly lying under oath to any material facts in any proceeding" results in a "Dismissal" for a first offense. (emphasis added).

In further support of its argument that dismissal is not the only appropriate penalty under the Disciplinary Code for Grievant's established violation of 1-S007-10, the Union also points to a list of police officers who are not permitted to testify by the District Attorney because they have lied or were accused of lying. Thus, according to the Union, there are at least some police officers currently employed who lied or were accused of lying. This list was not introduced at the hearing, however; nor was any evidence submitted regarding the specific facts associated with any officer on the list. Thus, there is no evidentiary basis for a finding that any of the officers on this list are similarly situated to Grievant.

Finally, the Union makes a valid distinction between the facts that resulted in Grievant's termination and the examples of comparators provided by the City in that the officers in those examples were found to have lied while on-duty. This record does not include any evidence

regarding any officer who was or was not terminated after being found to have lied under oath while off-duty. Moreover, although the comparators submitted by the City may constitute support for the City's position in this case, they do not constitute the primary evidence on which I find that Grievant's termination should be upheld. Rather, as detailed above, I find that Grievant rendered himself subject to discipline when he knowingly lied under oath regarding a material fact in the PFA proceedings and that, pursuant to the express terms of 1-\$007-10, the penalty for this first offense is dismissal.

On the totality of the evidence, I find that Grievant properly was disciplined under 1-\$009-10, 6-\$009-10, and 6-\$010-10 of the Disciplinary Code. For the reasons set forth above, I also uphold Grievant's termination under 1-\$007-10. Accordingly, the grievance will be denied in the Award below.

AWARD

The grievance is denied.

Samantha E. Tower

Samantha E. Tower, Esq.

Arbitrator

October 8, 2018